

UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant:	Robert Muller-Moore	
Mark:	EAT MORE KALE	Examining Attorney
Serial No.:	85412053	Caryn Glasser
Filing Date:	August 31, 2011	Law Office 108

Response to Office Action

Applicant supplies this response to the Office Actions issued by the Examining Attorney on December 18, 2011 and March 27, 2012, the former rejecting the specimens, the latter adding a 2(d) rejection against the goods in Applicant's International Class 25 and the "imprinting of decorative designs on T-shirts" service in International Class 40 following the Office's receipt of a letter of protest and maintaining and continuing the specimen rejection.

Applicant responds to the specimen rejection by submitting substitute specimens in use on the filing date (and still in use). Amendments to the application are incorporated into the electronic form where appropriate, as well as made in identical form herein. Applicant responds to the 2(d) rejection with the remarks below, along with the evidence in support, attached to this response and described herein.

Amendments

Applicant amends his application to substitute the specimen attached as **Exhibit A** ("IC 16 Substitute Specimen") for the specimen demonstrating use on "stickers" in International Class 16, and in furtherance of this amendment amends his application as follows:

The substitute specimen attached as **Exhibit A** was in use in commerce at least as early as the filing date of the application.

Applicant's declaration signature below is in support of this declaration and all other portions of this Response requiring a declaration signature.

The specimen attached as **Exhibit A** consists of a digital photograph of Applicant's sticker product.

The date of first use of the mark anywhere for "stickers" is amended to 03/04/2003, and the date of first use of the mark in interstate commerce is amended to 06/20/2003.

Applicant amends his application to substitute the specimen attached as **Exhibit B** ("IC 25 Substitute Specimen") for the specimen demonstrating use on all of the use-based

items in International Class 25, and in furtherance of this amendment amends his application as follows:

The substitute specimens attached as **Exhibit B** were in use in commerce at least as early as the filing date of the application.

The specimen attached as **Exhibit B** consists of digital photographs of two of Applicant's t-shirt products.

The date of first use of the mark anywhere for the Applicant's use-based items in International Class 25 is amended to 06/00/2001. The date of first use of the mark in interstate commerce for the Applicant's use-based items in International Class 25 is amended to 08/00/2001.

Applicant amends his application to substitute the specimen attached as **Exhibit C** ("IC 40 Substitute Specimen") for the specimen demonstrating use on all of the services in International Class 40, and in furtherance of this amendment amends his application as follows:

The substitute specimen attached as **Exhibit C** was in use in commerce at least as early as the filing date of the application.

The specimen attached as **Exhibit C** consists of a page within Applicant's website advertising his services.

The date of first use of the mark anywhere for the Applicant's services in International Class 40 is amended to 06/00/2001. The date of first use of the mark in interstate commerce for the Applicant's services in International Class 40 is amended to 08/00/2001.

Applicant further amends his Application to appoint Ashlyn Lembree as an additional attorney of record, continuing the appointment of Daniel Richardson as well. Attorney Richardson will continue as the Correspondent.

Remarks

Specimen

The Office rejected the specimens filed with the application on the basis that they consisted of **drawings** of a sticker and t-shirt. The substitute specimens for International Classes 16 and 25 consist of digital **photos** of the same items for which drawings were submitted. Applicant respectfully submits that the manner of display of the mark on the sticker and t-shirt demonstrate trademark use, and adds that this trademark use is further demonstrated within the remarks and evidence raised below in connection with Applicant's remarks with regard to the 2(d) rejection.

Applicant additionally amends his application to substitute one of Applicant's web pages advertising his services in International Class 40.

Likelihood of Confusion - 2(d) – as to International Classes 25 and 40

Applicant respectfully submits that its mark, EAT MORE KALE (“Applicant’s Mark”), as applied to the goods and services identified in his application in International Classes 25 and 40,¹ does not create a likelihood of confusion, as defined in Section 2(d) of the Trademark Act, 15 U.S.C. Section 1052(d), when compared with EAT MOR CHIKIN (Reg. Nos. 2062809, 2197973, and 2538050) (herein, collectively, the “Cited Mark”). As is more fully set forth below, the dominant elements of each respective mark are KALE and CHIKIN, not EAT MORE and EAT MOR. Supporting this conclusion are the following facts: (1) Neither mark (understandably) carries a disclaimer to any part of the marks (distinguishing these marks from cases relying on the first-word-is-more-dominant rule); (2) the sentence structure of the marks leads the average purchaser to focus on the direct object of the sentences; and (3) the widespread use of EAT MORE in the t-shirt marketplace renders the EAT MORE and EAT MOR phrases inherently weak. In addition, as the Examining Attorney points out, the question is not whether the marks are confused, but whether purchasers will be confused into believing that the goods come from the same source. The general impression on purchasers and prospective purchasers of both marks is a nutritionally political message that would be plastered on the chests of the purchasers. Because the messages embedded within these marks are significantly different (eat popular-at-farm-stands-kale versus eat more-white-meat-rather-than-beef), the lasting, general impressions of the respective marks will not lead to a confusion of source of the goods or services. For this same reason, the consumers are sophisticated. Moreover, the channels of trade for these particular goods and services are distinct, given the embedded message, the secondary source of the goods/services, and the respective sources. Finally, even in this ex parte examination posture, the Examining Attorney can rely on the lengthy co-existence of the marks. Consequently, Applicant respectfully traverses and requests that Applicant’s Mark be approved for publication.

I. Comparing the Marks in Their Entireties, the Marks are Highly Dissimilar

“The basic principle in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used.” *In re National Data Corp.*, 224 USPQ 749, 750, 753 F.2d 1056, 1058, (Fed. Cir. 1985) (citations omitted). “It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark.” *Id.* at 751 (citations omitted). That being said, “there is

¹ Applicant notes that International Class 16 and the “Screen printing; Silk screen printing” services in International Class 40 do not appear to fall under the 2(d) rejection cited in the March 27, 2012 office action and makes his argument with that understanding. Applicant further asserts that no likelihood of confusion exists with Reg. Nos. 2062809, 2197973, and 2538050 with respect to these Class 16 and 40 goods/services for the reasons further provided herein.

nothing improper in stating that, for rational reasons, more or less weight [may be] given to a particular feature of a mark.” *Id.*

In the case at bar, less weight should be given to EAT MORE and EAT MOR, and more weight should be given to KALE and CHIKIN. In light of the different connotations of the marks, the marks are not similar.

A. EAT MORE and EAT MOR are Not the Dominant Elements of the Marks.

In this case, the first terms in the marks should not be afforded more weight. The first-word-impression rule is applied on a case-specific basis and not in isolation. Because the marks in the present case are inherently distinctive in their entirety and other factors diminish the relative impression of EAT MORE and EAT MOR compared to KALE and CHIKIN, the first-word-impression rule should not be applied in this case.

Although the Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board decisions cited by the Examining Attorney recognize a non-universal principle that the first word is often of greatest consumer impression when comparing marks, such consideration is neither dispositive nor applied in isolation. The three cases cited by the Examining Attorney are distinguishable from the present case because the marks in those cases involve descriptive elements that bear on the first-word-impression rule, whereas the marks EAT MORE KALE and EAT MOR CHIKIN as applied to t-shirts and other apparel and services for imprinting of decorative designs on t-shirts are inherently distinctive in their entirety. None of the stated goods or services pertain to eating or kale or chicken.

The *Mattel Inc. v. Funline Merchandise Co.* case is distinguishable from the present case. In *Mattel*, the Board compared RAD RODS (plus design) and RAD RIGS, both for toy vehicles, both with the second term in the marks disclaimed on the basis that RODS describes toy vehicles (as in “hot rods”) and RIGS describes toy vehicles (as in tractor trailers). The Board in *Mattel* did not rely exclusively on the first-word placement of RAD in finding the marks similar: “In view of the descriptive nature of the terms RIGS and RODS, and because RAD is the first term in each mark, it is the term RAD which dominates the commercial impression of each mark and is entitled to greater weight in our comparison of the marks.” *Mattel Inc. v. Funline Merchandise Co.*, 81 USPQ2d 1372, 1375 (TTAB 2006) (Board noting multiple factors in similarity and distinctiveness of terms). As is consistent throughout the cases cited by the examiner, the first-word-impression conclusion is not applied in isolation. As is further discussed below, EAT MORE and EAT MOR do not carry the greatest impression in their respective marks; to apply the first-word-impression rule without consideration of other factors bearing on relative weight of the terms in the mark would be to apply the rule in isolation, in contradiction to the weight of authority. The *Mattel* case is also distinguishable from the present case because KALE and CHIKIN are not descriptive of t-shirts and services pertaining to t-shirts, unlike RODS and RIGS in the *Mattel* case.

The *Presto Products* case is distinguishable from the present case. When comparing KIDWIPES and KID STUFF, both for premoistened disposable towelettes commonly known as wipes, the Board found the marks similar “in that both start with the term ‘KID’ (a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered) and have the same number of letters and syllables.” *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (using the term “often” to convey that the rule is not automatic and presenting other factors bearing on similarity). Rather than relying on the first-word-impression rule, the Board relied more heavily on the similarity in meaning as the overarching reason for holding the marks similar. *Id.*; *see also id.* at n.7 (“While we agree that the term ‘KID’ is highly suggestive, if not descriptive, as applied to the goods here involved, the similarities between the marks of the parties, as detailed above, extend beyond the mere inclusion in each of that term.”). The *Presto Products* marks were both so highly suggestive as a whole that they carried the same meaning when applied to the goods, leaving the same overall impression. That same impression, when paired with the same number of syllables and letters plus the common term KID, all combined to render the marks similar. In the present case, as is discussed below, the KALE and CHIKIN elements of the respective marks, the structural nature of the marks, and the consumer conditioning due to widespread use of EAT MORE in the marketplace, leave consumers with different overall commercial impressions as to the meaning of the marks.

The *Palm Bay Imports* case is also distinguishable from the present case. In *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689, 396 F.3d 1369 (Fed. Cir. 2005), the Federal Circuit found VEUVÉ ROYALE and VEUVÉ CLICQUOT similar. As applied to sparkling wine, VEUVÉ (meaning “widow”) was found to be arbitrary and ROYALE was found to be laudatory. “The presence of this strong distinctive term as the first word in both parties’ marks renders the marks similar, *especially in light of the largely laudatory (and hence non-source identifying) significance of the word ROYALE.*” *Id.* at 1692 (emphasis supplied). Unlike the *Palm Bay* case, the present case involves a comparison of two marks that are entirely inherently distinctive, allowing significant weight to the comparison of terms following the first terms of the mark.

While the Examining Attorney’s citation of authority is well-headed, Applicant respectfully traverses the applicability of the first-word-impression rule in this case in light of the lack of any descriptive terms in the marks that would logically cause greater stress on the first terms as well as the other considerations raised below, including consumer conditioning as to EAT MORE, stress on the direct object, and overall commercial impression.

B. Applicant’s Mark and the Cited Mark Are Different in Appearance, Sound, Connotation, and Commercial Impression: The Marks in Question Should Not Be Reduced to a Similarity Between the First Two Words of the Three Word Marks Because the Dominant Element in Both Marks is the Last Word

When evaluating likelihood of confusion, differences in meaning, appearance, sound, and overall commercial impression may be enough to conclude that two similar marks do not create a likelihood of confusion. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 73 USPQ2d 1689, 1691, 396 F.3d 1369, 1371 (Fed. Cir. 2005). Also, different meanings of otherwise similar marks may overcome a likelihood of confusion that would otherwise result. *Elvis Presley Enters., Inc. v. Capece*, 46 USPQ2d 1737, 1747–48, 141 F.3d 188, 201 (5th Cir. 1998).

While both marks utilize the two-syllable transitive verb and adjective combination “EAT MORE” in arguably different fashions seeing that the spelling is different, the fact that the Applicant’s Mark uses “KALE” as opposed to “CHIKIN” erases any likelihood of confusion. See **Exhibit D** (definition of “eat” as a transitive verb). These EAT MORE/EAT MOR phrases should be allowed to co-exist just as the following marks co-exist in Exhibit E.

Reg. No. [Ex. No.]	Mark	Owner	Reg. No. [Ex. No.]	Mark	Owner
3908722 [E1]	DRINK FLAIR	Werth, Anne E INDIVIDUAL UNITED STATES 6404 Audie Dr. Sioux Falls SOUTH DAKOTA 57108	3775978 [E2]	DRINK INKS	Drink Inks, LLC LIMITED LIABILITY COMPANY CALIFORNIA 8016 Run of the Knolls San Diego CALIFORNIA 92127
3056443 [E3]	DRINK UP	Marchello Enterprises, LLC CORPORATION NEW YORK 5 Inez Drive Bay Shore NEW YORK 11706	3074978 [E4]	DRINK LOCAL	Desiderio, Mina INDIVIDUAL UNITED STATES 2715 Fairfield St San Diego CALIFORNIA 92109
3730703 [E5]	GOT MILK?	California Milk Processor Board STATE INSTRUMENTALIT Y CALIFORNIA Suite 202 101 South El Camino Real San Clemente CALIFORNIA 92672	4055111 [E6]	GOT CHESS?	Daniel J. Vellotti DBA Little Chess Masters and Young Chess Masters INDIVIDUAL UNITED STATES 2913 North 36th Street Boise IDAHO 83703

4052883 [E7]	GOT RUM?	Rum Runner Press, Inc. CORPORATION TEXAS 107 Rock Chalk Court Round Rock TEXAS 78664	3191521 [E8]	GOT PINOT?	Testarossa Vineyards LLC LIMITED LIABILITY COMPANY CALIFORNIA 330-A College Ave. Los Gatos CALIFORNIA 95030
3170649 [E9]	GOT MEAD?	Rowe, Vicky L. INDIVIDUAL UNITED STATES 131 Cedar Creek Lane Youngsville NORTH CAROLINA 27596	3330441 [E10]	GOT TEQUILA ?	SKYY SPIRITS, LLC DBA CAMPARI AMERICA LIMITED LIABILITY COMPANY DELAWARE ONE BEACH STREET, SUITE 300 SAN FRANCISCO CALIFORNIA 94133
3667740 [E11]	GOT ORGANIC ?	E- MARKETINGUSA, INC CORPORATION WASHINGTON P.O. BOX 2263 Wenatchee WASHINGTON 98807	3387216 [E12]	GOT FOOD?	SAMOS, DEE DEE INDIVIDUAL UNITED STATES 1010 GRANADA STREET VALLEJO CALIFORNIA 94591

The two pairs of “Drink _____” marks come from the same International Class (IC “016” for ‘Flair’ and ‘Inks’ and IC “025” for ‘Local’ and ‘Up’). All “Got _____” marks come from IC “025”. There are over 200 registered, live marks in IC “025” with the word “GOT” in the mark title, the majority following the pattern of “GOT _____?”, including the well-known “GOT MILK?”. There are over 1,400 registered, live marks across all International Classes with the word “GOT” in the mark name, with the majority again following the pattern “GOT _____?”. The “GOT” marks all follow the same transitive verb and noun formation pattern.

Kale and chicken are highly dissimilar. "KALE" is defined as “a hardy cabbage (*Brassica oleracea acephala*) with curled often finely incised leaves that do not form a dense head; also, its leaves used as a vegetable.” **Exhibit F** (Merriam-Webster Dictionary, definition of "kale"). Further, “KALE” is known for being a healthy superfood, containing Vitamins A, C, and K, fiber, calcium, magnesium, vitamin B6, copper, potassium, iron, manganese, and phosphorus. **Exhibit G** (Catherine Ebeling, RN, BSN & Mike Geary, "Kale -- The Superfood Nutrition Status"). Put simply, a *USA Today* article has noted “‘EAT MORE KALE’ sounds like a . . . healthy thing to say.” **Exhibit H** (Laura Petrecca, "Social Media Changes Fights Over Trademarks, USA TODAY (March 12, 2012). In contrast, “CHICKEN” is defined as “the common domestic

fowl (*Gallus gallus*), especially when young; also, its flesh used as food.” (**Exhibit I**). Furthermore, the CHICKEN promoted here is primarily a breaded and fried product that is sold and promoted as “fast-food.” **Exhibit J** (Chuck Salter, *Chick-fil-A’s Recipe for Customer Service*, FAST COMPANY); **Exhibit Q** (*infra* Part III).

The meaning of EAT MORE KALE implies that someone or something is being encouraged to eat more of a leafy green vegetable. EAT MOR CHIKIN, spelled incorrectly to insinuate that the message comes from an uneducated source (here, cows), implies that someone or something is being instructed to eat more of the flesh of a domesticated bird. A typical consumer of t-shirts would certainly distinguish fresh green vegetables from fowl.

In the Second Office Action, it was asserted that EAT MORE/EAT MOR are the dominant elements of the respective marks, rendering the marks similar. Applicant respectfully traverses this analysis. Because “kale” and “chicken” are on the receiving end of the action of the command sentences, they are the most dominant elements of the respective marks. Kale and chicken are highly dissimilar. Furthermore, one (KALE) utilizes a true, literate spelling while the other (CHIKIN) utilizes an illiterate-characterizing, phonetic equivalent spelling. When considering the meaning and overall commercial impression of the marks, the marks are dissimilar.

As supported above, KALE and CHIKIN are the dominant elements of the respective marks. These dominant elements are dissimilar in sound and appearance. They begin and end with different letters and sounds, they have no overlapping letters other than K (with that letter in dissimilar locations), they are of different lengths (4 versus 6 letters), and of different syllabic composition (one versus two syllables).

As such, there is no likelihood of confusion between the source of the goods and services marketed in connection with the Applicant’s Mark and the source of goods and services marketed in connection with the Cited Mark. On this basis, Applicant requests that the Examining Attorney withdraw her refusal and approve this mark for publication.

C. Because the “Eat More” Phrase is Commonly Used in the Marketplace, It is Weak

(i) The use of identical, even dominant, words in common does not automatically mean that two marks are similar. *General Mills, Inc. v. Kellogg Co.*, 3 USPQ2d 1442, 1445, 824 F.2d 622, 627 (8th Cir. 1987). If common elements of conflicting marks are weak and being used by many other sellers in the market, the likelihood of confusion between the marks is significantly reduced and not likely to be perceived by purchasers as a distinguishing source because it is merely descriptive or diluted. *See Shen Mfg. Co. v. Ritz Hotel Ltd.*, 73 USPQ2d 1350, 1356–57, 393 F.3d 1238, 1245 (Fed. Cir. 2004); *see also* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 23.48 (4th ed. 2012).

The mere fact that the words “EAT MORE” are found in both the Applicant’s Mark and the Cited Mark does not make the marks confusingly similar in terms of meaning, appearance, or in any other respect. For the reasons cited in Sections A and B, *infra*, Applicant asserts that “EAT MORE” is a weak part of the mark and that “KALE” serves as the “heart of the mark.” To determine otherwise would give the Cited Mark a de facto all-encompassing trademark to “EAT MORE.” The word “CHIKIN,” would be disregarded. Registrants are not entitled to wild card registrations providing them with a exclusivity over all endings (or beginnings) that might be affiliated with a portion of a mark. *In re National Data Corp.*, 224 USPQ 749, 752, 753 F.2d 1056, 1059 (“The registration affords prima facie rights in the mark *as a whole*, not in any component.”) (emphasis in original).

Moreover, any likelihood of confusion will be avoided because consumers can distinguish between goods and services marketed in connection with the Applicant’s Mark and the goods and services marketed in connection with the Cited Mark. *See Sports Authority Michigan v. PC Authority*, 63 USPQ2d 1782, 1798 (TTAB 2002). Here, for example, EAT MOR CHIKIN is used to sell t-shirts by keying on the unique combination of purposeful misspelling, cow imagery, and a central conceit (here, bovine self-preservation). In contrast, the Applicant uses EAT MORE KALE, in its literal spelling, to promote healthy eating, encourage individuals to eat local produce, and support small farmers.

(ii) Third-party use is relevant in this case because evidence establishing that the consuming public is exposed to a third-party use of similar marks on similar goods and to market similar services shows that “a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 73 U.S.P.Q.2d 1689, 1693, 396 F.3d 1369, 1373 (Fed. Cir. 2005) (citing *General Mills, Inc. v. Kellogg Co.*, 3 USPQ2d 1442, 1445, 824 F.2d 622, 626–27, (8th Cir. 1987); J. THOMAS MCCARTHY, 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §11:88 (4th ed. 2001)).

In addition to the Applicant’s Mark, a Google Shopping search for t-shirts and printing services using the words “EAT MORE” produces over 950 results. **Exhibit K** (Google shopping search results). Additional uses of “EAT MORE” on t-shirts and for t-shirt printing services include, but are not limited, to:

“EAT MORE” MARK	Website Featured	Exhibit
EAT MORE CARROTS	Redbubble.com	L1
EAT MORE GREENS	LRG – surffanatics.com	L2
EAT MORE CARBS	Buycoolshirts.com	L3
EAT MORE FRUIT	Giftapolis.com	L4

EAT MORE PLANKTON	Shirtcity.us	L5
EAT MORE BACON	Baconfreak.com	L6
EAT MORE TEES	Eatmoretees.com	L7
EAT MORE FISH	Looney Tunes - Amazon.com	L8
EAT MORE FAST FOOD	Uplanders.com	L9
EAT MORE MEAT	Michaelsymon.bigcartel.com	L10
EAT MORE BUTT	Heavysbbq.com	L11
EAT MORE TACOS	Goodie Two Sleeves – Polyvore.com	L12

Because several parties, in addition to the owner of the Cited Mark, use the words “EAT MORE” as a part of their mark, Applicant asserts that the scope of protection afforded to the Cited Mark is narrow. Further, a simple Google search of “EAT MORE” produces links to Applicant’s website and the website of eatmoretees.com, while producing zero front-page hits for the owner of the Cited Mark. **Exhibit M** (Google search results described). Further, multiple Google Image searches for “Eat More” produces over a dozen hits featuring the Applicant and the Applicant’s Mark, while only producing two to three hits for the Cited Mark. Applicant posits that the co-existence of all parties and additional third parties using “EAT MORE,” makes the scope of protection for the Cited Mark extremely narrow. Thus, the potential for likelihood of confusion between the Applicant’s Mark and the Cited Mark is significantly minimized.

In the same way that all the parties using “EAT MORE,” including the Cited Mark, co-exist without any confusion, there is no reason why the Applicant’s Mark cannot likewise co-exist without confusion. On this basis, Applicant’s Mark should be allowed for publication.

II. The Nutritionally Political Messages Conveyed in the Respective Marks Signal Different Overall Commercial Impressions, Consumer Sophistication, and Different Channels of Trade

A. EAT MORE KALE and EAT MOR CHIKIN are Nutritionally Political Messages.

Taking in the whole of the attached evidence of the context in which EAT MORE t-shirts are sold, as found in **Exhibits L1 through L12**, it is apparent that EAT MORE _____ is a political message. In the case of Applicant’s use in particular, EAT MORE KALE invokes the message of buying and eating locally grown produce and living close to the earth and the farmer. *See, e.g., Exhibit G* (third party characterization of EAT MORE KALE as “a healthy thing to say”); **Exhibit C** (specimen for service

mark). In the case of the Cited Registrations, all owned by CFA Properties, Inc., and as shown in the mark drawing for Reg. No. 2538050, the message is from cows and asks consumers to eat more chicken (as opposed to beef). CFA Properties holds a registration for the same mark for “restaurant services.” Reg. No. 2538070. It is apparent that the t-shirts are secondary and promotional to the restaurant services. *See In re Expo '74*, 189 USPQ 48 (TTAB 1975); *In re Olin Corp.*, 181 USPQ 182 (TTAB 1973).

B. The Marks’ Respective Messages Create a Different Overall Commercial Impression.

In addition to the difference in the dominant elements of the marks, discussed *infra*, the marks have a different overall commercial impression. The Applicant’s Mark leaves a consumer imprint centered on the word KALE and the message to buy and eat local-farmer-grown produce. In great contrast, any consumer eating a chicken sandwich in a restaurant owned by CFA Properties (or buying a t-shirt promoting that restaurant) will likely have no idea whether the chicken was grown and slaughtered locally or was free range at a small, local farm, but rather would assume the opposite or not care. The impression left with consumers with regard to Applicant’s mark is one of caring about the source of your food. The impression left with consumers with regard to the Cited Registrations is to substitute chicken for beef, without care as to the source of the alternate food product. These differences create dissimilar marks.

C. Marks Carrying an Embedded Message Tend to Demonstrate Sophisticated Consumers

Although not expensive, goods carrying a political message tend to be purchased by sophisticated consumers. *See Int’l Assoc. of Machinists and Aerospace Workers, AFL-CIO v. Winship Green Nursing Center*, 41 USPQ2d 1251, 1258–59, 103 F.3d 196, 206–207 (1st Cir. 1996) (holding no likelihood of confusion in labor union dispute with employer and the circulation of propaganda documents). If that were not enough, the outrage and publicity surrounding CFA Properties’ aggressive trademark tactics toward Applicant’s continued use and registration of his mark, see, for example **Exhibit H, Q, R, S, T, U, & V** (news articles on the current conflict), has resulted in a “forced sophistication” of the purchasing (as well as non-purchasing) public making confusion unlikely. In the present case, consumers of Applicant’s goods and services support the political (or at least quasi-political) local-farmer-grown produce advocacy of Applicant. Consumers of CFA t-shirts are very likely to also support a political position of CFA, making those consumers sophisticated as well. The President of CFA, speaking on behalf of the privately-held company, spoke against gay marriage, causing a polarization of supporters and non-supporters of CFA. *See, e.g., Exhibit W1* (Elizabeth Tenety, “Chick fil-A Appreciation Day’ announced by Mike Huckabee amidst gay marriage debate”); **Exhibit W2** (Associated Press, “Chick-fil-A sandwiches become a political symbol”); **Exhibit W3** (Leon Stafford and Katie Leslie, “Chick-fil-A faces image problem over marriage stance”). In light of the strong public outcry by CFA’s opponents, it is highly unlikely that those opponents would purchase an EAT MORE CHIKIN t-shirt. On the flip side, it is likely that after the recent, substantial press on the issue, a consumer buying

an EAT MOR CHIKIN t-shirt would only do so in support of CFA's stance on gay marriage. In short, consumers of both products are sophisticated and buying with a political message in mind.

D. Marks on T-shirts that are Secondary to the Source Travel in Limited Channels of Trade

Where t-shirts and promotional items are secondary to the source, they tend not to be sold in common venues. For example, college apparel tends to be sold at the college bookstore and at authorized retailers. *See In re Olin, supra* ("Where the shirt is distributed by other than the university the university's name on the shirt will indicate the sponsorship or authorization by the university.") In the present case, the EAT MORE KALE shirts are exclusively manufactured at Applicant's house or facility in Vermont. They are then delivered from Applicant's house or facility directly to customers or to local stores, or they are sold at local farmers' markets (consistent with the message embedded in the mark). **Exhibit C.** In light of the secondary nature of the EAT MOR CHIKIN t-shirts, *see* discussion at II., A., *supra*, those t-shirts are likely to be sold at CFA Properties' restaurants. *See, e.g., Exhibit N* (registrations and Internet evidence suggesting sale of t-shirts at restaurants in a secondary nature). Consequently, the channels of trade necessarily overlap less, if at all than directly competing goods/services.

III. The Respective Marks Have Co-Existed for Eleven Years With the Applicant Having a Strong Mark.

When two marks have achieved a significant degree of notoriety, "the public will easily recognize the difference in the marks and distinguish between them." *Marshall Field & Co. v. Mrs. Fields Cookies*, 25 USPQ2d 1321, 1332 (TTAB 1992).

EAT MORE KALE is used to sell t-shirts and market an eco-friendly t-shirt printing business that is very distinct, unique, famous, and adored by the public. This fame is evidenced by the fact that EAT MORE KALE's Facebook page has received 11,188 "likes," **Exhibit O**, and its change.org petition page has already received 36,920 signatures promoting its message in wake of its trademark dispute with the owner of the Cited Mark, **Exhibit P**. National newspapers and magazines such as *The New York Times*, *USA Today*, *The Economist*, *The Huffington Post*, *Yahoo! News*, *The Christian Science Monitor*, and *The Christian Post* have also featured Eat More Kale in various articles, **Exhibit Q, R, S, T, U, & V**, notably assuring the public that EAT MORE KALE and EAT MOR CHIKIN clothing and t-shirt printing services do not come from the same source. The publicity surrounding the Applicant's dispute with the owner of the Cited Mark has resulted in significant wide exposure of the Applicant's "Eat Local" and "Eat Healthy" message, to which no likelihood of confusion is evident. Applicant has received numerous e-mails from consumers declaring their lack of confusion between EAT MORE KALE and EAT MOR CHIKIN and expressing outrage at Chick-Fil-A's assertion of confusion. **Exhibit X** is comprised of 120 e-mails Applicant received on March 28, 29, and 30; April 1 and 5; and August 19 and 20, 2012. This lengthy duration of co-existence, demonstrated by the dates of first use of the registrations and application,

combined with the strength of Applicant's Mark shown in third party publicity, stands as self-evident of the lack of any confusion, even in the context of an ex parte examination.

Conclusion

Applicant respectfully asks that his mark be approved for publication. Applicant's substitute specimens are in order and the Mark does not create a likelihood of confusion with the Cited Registrations. The respective marks are different in meaning, overall commercial impression, and in their dominant elements. Widespread use of EAT MORE on t-shirts has conditioned consumers to view the direct object in the command sentence, which in the present case is highly dissimilar. The purchasing consumers are sophisticated and the goods/services are unlikely to travel in similar channels of trade. Finally, eleven years of co-existence of the marks strongly supports a finding of no confusion.

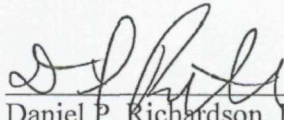
Respectfully submitted,
ROBERT MULLER-MOORE,
By His Attorneys,

Dated: Sept. 26, 2012



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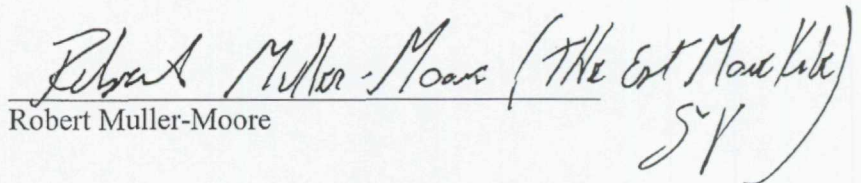


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Declaration Signature

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

Dated: 9/26/12



Robert Muller-Moore